Supreme Court, U.S.
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No. 02-550

In The
Supreme Court of the United States

R. DALE STERRITT, JR., RICHARD D. STERRITT, SR., LARRY STERRITT, STERRITT PROPERTIES, INC., and 20TH CENTURY HOLDINGS, INC.,

Petitioners,

v.

CONTINENTAL INVESTMENT CORPORATION and STEWART RAHR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does this case implicate any genuine due process concerns where the record, fairly construed, presents only the following questions:

   a. Does a District Court have the discretion to order parties to participate in drafting and filing a joint pretrial order that outlines the claims and defenses at issue, and to enforce such an order by barring the non-participants from presenting evidence or questioning witnesses?

   b. Where a District Court initially prohibits parties who failed to participate in the joint pretrial order from presenting evidence or questioning witnesses, does the District Court have the discretion, before trial commences, to reverse its order and to allow those parties to participate fully in trial?

   c. Do the defendants waive any complaint about a District Court's time allocations, where the defendants (i) rested their cases without using all their allocated time, and (ii) failed to identify any witnesses they would have called had they been granted even more time?

   d. Does a District Court have the discretion to set time limits on the presentation of evidence in a jury trial, and, if so, is allocating the time equally among plaintiffs and defendants, and among defendants on a per capita basis, within the Court's discretion?

2. Does this case present any novel or important question of federal securities law, where, as here:

   a. The Final Judgment is based and can be affirmed on the jury's findings that all the defendants violated Texas state law?

   b. Petitioners failed properly to present their alleged defense under federal securities law to the District Court?

   c. This Court already has held that a defense under the doctrine of *in pari delicto* is not available to persons like Petitioners, *i.e.*, the persons who supplied the so-called inside information?

   d. The record, fairly construed, contains evidence of numerous misrepresentations, many of which were not, even arguably, subject to any cautionary statement?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioners, five additional parties warrant mention. Malcolm M. Kelso, Edward W. Roush, Jr., and Freddie Joe Royer, Jr. were defendants-appellants in the proceedings below, but did not file a petition for certiorari here. Richard Straza and Robyn Ann Straza-Sterritt were defendants in the District Court, but did not pursue an appeal to the Court of Appeals for the Fifth Circuit, and did not file a petition for certiorari here.

Continental Investment Corporation has no parent corporation. No publicly traded corporation owns more than 10 percent of Continental Investment Corporation's stock.

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STATEMENT OF THE CASE

Petitioners Richard D. Sterritt, Sr. (*"Dick Sterritt"*) and R. Dale Sterritt, Jr. (*"Dale Sterritt"*) obtained control of Continental Investment Corporation (*"CIC"*) in 1991. PX802. During the next seven years, they converted CIC into a massive fraudulent enterprise, the principal purpose of which was to raise investment dollars to be siphoned into the pockets of the Sterritts and their confederates.

Stewart Rahr (*"Rahr"*) was CIC's largest investor. From the fall of 1995 through the spring of 1998, he bought $11.6 million of CIC stock for himself, his wife, and his children. 2SR8:688; PX81-88. That entire investment (as well as the investments of many others) was lost as a consequence of the Sterritts' frauds.

I. The Sterritts Used Fraudulent Transactions To Inflate CIC's Balance Sheet.

To attract investors, the Sterritts created the appearance that CIC possessed valuable assets. To accomplish this, the Sterritts used related corporations to transfer assets to CIC at inflated prices. In violation of SEC regulations, the Sterritts disguised the fact that the transactions were among related parties. 2SR6:400-10. Then, in violation of generally accepted accounting principles, the Sterritts caused CIC to place the assets on its balance sheet at the inflated values. *Id.*

An example of one such transaction (taken from the numerous transactions established by the evidence) involved Petitioner 20th Century Holdings, Inc. (*"20th Century"*) and Swan Financial Services, Inc. (*"Swan Financial"*). Dick Sterritt had prevailed upon a family

friend, Wilma Graham, to act as the owner of Swan Financial, agreeing that her ownership would be illusory. PXA:36-38, 60, 183-86; PX723:5. Graham had almost no understanding of Swan Financial's business affairs; her job was simply to sign blank checks, deeds, and other documents. PXA:49, 68-69, 72-73, 79-81, 83-84, 103-04, 113-15, 118-19. Dick Sterritt maintained the company's bank accounts and business records, and he and Dale Sterritt controlled its business affairs. 2SR6:237, 346-47; PXA:68-69, 96-97, 372, 607-08.

In late 1994, 20th Century acquired a 74-acre parcel of land in Atlanta for $440,000. 2SR6:410-16; PX103. By a deed dated five months later, 20th Century sold the land to Swan Financial for $600,000. 2SR6:410-16; PX109. Only eight days after the deed from 20th Century was recorded, Swan Financial sold the land to CIC for $3.4 million. 2SR6:410-16; PX111. Thus, as reflected on CIC's balance sheet, the land's value was inflated by almost $3 million. 2SR6:414-16; PX816.

All told, the Sterritts used related-party transactions to inflate CIC's balance sheet by almost $10 million.[1] 2SR7:16-17.

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[1] The Sterritts obtained most of their CIC stock in a fraudulent transaction involving Petitioner Sterritt Properties, Inc. 2SR7:18-29; PX281. As a consequence, Petitioners' claim that most of the Sterritt family assets were "invested" in CIC stock is misleading. *See* Petition at 4. The Sterritts received their CIC stock for no real consideration.

II. The Sterritts Lied That CIC's Immense Quarry Excavation Could Be Used As a Landfill.

CIC's principal asset was a 133-acre site in Atlanta, featuring an enormous quarry excavation known as the "*Hole*." 2SR5:13-14; PX16:7. In late 1993, Dale Sterritt commissioned an engineering firm to study whether the Hole could be used as a landfill. PXB:7-8, 12-13; PX11-12.

The study focused only on the least problematic (and least profitable) category of landfill, a landfill for inert waste.[2] PXB:12-13; PX13:CIC0202853, 69.[3] The engineering firm's written report indicated that, because of the irregular shape and extraordinary depth of the excavation, and because of fractures in the quarry wall, groundwater and storm water were likely to present significant problems even for an inert waste landfill. PX13:CIC02027867, 83; *see also* PXB:24-25, 36-38. Needless to say, these same problems made use of the Hole as a municipal solid waste landfill even more highly doubtful.[4]

After the engineering firm submitted its report, Dale Sterritt asked that the report be modified (without any further work) to include discussion of developing the Hole as a municipal solid waste landfill. PXB:34-36, 57. The

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[2] Inert waste includes materials, such as concrete and yard trimmings, that present no environmental concerns. PXB:13-14, 27-28.

[3] Because of an error in the original pagination of PX13, Respondents cite to particular pages using the Bates numbers of that exhibit.

[4] Municipal solid waste includes household garbage. PXB:16-17, 28. Landfills for municipal solid waste have the greatest revenues but also the greatest environmental concerns. They are subject to significant (and potentially costly) regulatory requirements. PXB:18-19.

firm's principal believed any modifications would be misleading and declined to change the report. PXB:36, 58.

Nonetheless, CIC's SEC filings, beginning in 1994, stated that the company had commissioned an independent study to explore converting the quarry "into a municipal solid waste landfill and waste transfer station." PX16:7. CIC's filings further stated that "the study concluded that the site would support landfill operations." *Id.* In 1995, the Sterritts added another embellishment: "A preliminary study of the [p]roperty indicated its viability as a potential multi-use waste disposal, waste transfer, and recycling facility." PX17:3. Dale Sterritt orally repeated those claims on numerous occasions to Rahr. 2SR8:689-92, 725-30. Of course, all those claims were false. PXB:43-46, 52-56.

III. The Sterritts Also Lied That CIC's Stock Would Be Listed on the NASDAQ Exchange.

The Sterritts did not confine their representations to lies about CIC's assets. The Sterritts also made misrepresentations about the marketability of CIC stock. Dale Sterritt repeatedly told investors, including Rahr, that because of its growing asset value, CIC was on the brink of being listed on the NASDAQ exchange. 2SR8:692, 727-28; PX46. Sterritt never revealed that on September 25, 1996, NASDAQ advised that it would *not* approve CIC's application for a listing. PX4. Instead, Sterritt continued to promise that he was making rapid progress at obtaining the listing. 2SR8:693-96.

IV. Through Yet More Fraudulent Transactions, the Sterritts Siphoned Millions of Dollars Out of CIC.

The end goal of the Sterritts' frauds was to siphon money out of CIC. Sometimes, the money came out as cash payments to undisclosed related parties, such as the cash components of the related-party transactions referenced above. More often, the cash came out by means of the Sterritts' stock fraud and "loans" to various (undisclosed) Sterritt affiliates. 2SR5:152-55, 177-98; 2SR6:250-52, 419-20; 2SR7:6; 2SR10:1145, 1287-89, 1292; 2SR11:1376-79; PX185-86, 203-07, 308-09, 511:168-71, 802, 802A. Using these methods, the Sterritts were able to divert several million dollars in cash and assets out of CIC, and were able to raise millions more by manipulating the price of and laundering CIC stock. *Id.*

V. In 1998, Rahr Discovered the Sterritts' Fraud, and Filed Suit.

In the summer of 1998, concerned that no progress had been made in permitting the Hole or obtaining a NASDAQ listing, Rahr began investigating Dale Sterritt's business activities. 2SR8:700-04, 710-13. By September 1998, Rahr had gathered significant evidence of fraud, 2SR8:713-14, 720-23, and filed suit in the United States District Court for the Eastern District of New York.

In January 1999, a corporation controlled by Dale Sterritt purported to "remove" Rahr's New York lawsuit to federal bankruptcy court in Texas. R8:1742-52; PX425. Eventually, on April 26, 1999, the reference was withdrawn, and the case came to rest, on May 18, 1999, before the Honorable A. Joe Fish, United States District Court for

the Northern District of Texas. R1:42, 69. In the meantime, the Sterritts had been removed from control of CIC, and CIC intervened to assert its claims against the Sterritts and their confederates.

By the time this case came to Judge Fish, he already was presiding over two related cases. And, he already had experience with the litigation tactics of Petitioners and their lieutenants. In attempting to block Judge Fish from ruling on injunction motions in related cases, the Sterritts and their co-defendants already had demonstrated their propensity to instigate bad-faith bankruptcy filings and collusive state court lawsuits designed to undermine the orders and jurisdiction of the District Court. *See* PX360-61. They continued those practices in this case, and on May 2, 2000, the District Court entered an order (a) requiring the defendants to file any related lawsuit in the Northern District of Texas, and (b) placing restrictions on any bankruptcy filings, unless the Court's consent was first obtained. ARE2.

VI. The Jury Found That the Sterritts Committed Numerous Violations of State and Federal Law.

On June 11, 2000, despite the defendants' efforts to derail it, this case came to trial. After hearing eight days of testimony, the jury deliberated for only a few hours and returned a unanimous verdict against the defendants. RE5. Among other things, the jury found that Petitioners had committed federal securities fraud, committed Texas statutory fraud, and entered into a civil conspiracy to commit statutory fraud against Rahr. *Id.* The jury also found that Petitioners breached their state-law fiduciary

duties and/or conspired to breach their state-law fiduciary duties to CIC. *Id.*

Based on that verdict, the District Court entered a Final Judgment in favor of Rahr and CIC. RE7. The Court of Appeals for the Fifth Circuit affirmed, in a per curiam opinion, finding no error "with respect to those issues not waived on appeal." *See* Petitioners' App. 1a-4a.

REASONS FOR DENYING THE WRIT

Respondents file this brief in opposition to point out numerous misstatements and material omissions in the Petition for Writ of Certiorari. *See* SUP. CT. R. 15(2).

I. This Case Does Not Present Any Genuine Due Process Concerns.

In their first attempt to grab this Court's attention, Petitioners pretend they are the victims of a capricious district court judge who was more concerned about protecting his own vacation schedule than he was about giving the defendants an opportunity to present their side of the case. *See* Petition at 12 (criticizing the District Court for placing its "own personal travel schedule ahead of the interests of justice and fair play"), 13 ("Here, sadly, the trial court's own travel schedule . . . seems to have caused the severe time limitations imposed upon Petitioners."), 15 n.6 (complaining that the District Court "express[ed] far more concern about his personal travel plans than the interests of justice and fair play"), 18 ("Here, sadly, the trial court's own travel schedule . . . seems to have caused the severe time limitations imposed upon the defendants."). Petitioners claim that the District Court's

time limits were so arbitrary that they violated the defendants' rights to due process of law. *See* Petition at 8, 10-14, 19-21.

In fact, however, the District Court's time limits appear arbitrary only if one ignores, as Petitioners do, the valid reasons for those limits. When the record is fairly examined, one can readily see that the District Court's actions were far from arbitrary. Rather, the District Court's actions were fair and reasoned responses to the circumstances before the Court. Certainly, the District Court's actions do not raise any genuine concerns about Petitioners' rights to due process of law.

A. The Time Allocations Were Based upon a Trial Length to Which Petitioners Agreed.

In portraying the District Court as arbitrary, Petitioners fail to mention that the District Court's time limits were based upon an estimated trial length to which Petitioners assented. In its Order Establishing Schedule and Certain Pretrial Requirements (the "*Scheduling Order*"), the District Court informed the parties that "the court intends to impose a reasonable limit on the time allowed for presenting evidence in this case," and asked the parties to provide an estimated length of trial. ARE1. Respondents did so, estimating that trial would last ten business days. ARE3. Petitioners (excluding Dale Sterritt, who failed to provide any estimate) estimated that trial would take a minimum of ten days. *Id.*

Relying upon the estimates, the District Court scheduled trial for ten days, and divided the approximately 52 hours available for the presentation of evidence equally between the plaintiffs and the defendants. 4SR1:5. Then,

when the defendants could not agree, the Court made a per capita allocation of the defendants' time. 4SR1:37.

B. Petitioners Did Not Use All the Time Allocated for the Presentation of Evidence.

Seeking to perpetuate the myth that the District Court unfairly limited each of them to 107 minutes for argument and the presentation of evidence, Petitioners obscure the fact that, when Dale Sterritt asked for an additional 60 minutes in which to present evidence, the District Court granted him 80 minutes. 2SR9:946,950; *see also* Petition at 14 & n.5. In addition, the so-called "RDSSR group" (which includes all of the Petitioners except Dale Sterritt) received 60 additional minutes from defendant Malcolm M. Kelso. 2SR8:871; 2SR11:1432.

And, all the Petitioners finally rested their cases *without exhausting their allocated time*. *See Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443, 451 (9th Cir. 1994) (reversal required only if time limits constitute harmful error); *McKnight v. General Motors Corp.*, 908 F.2d 104, 115 (7th Cir. 1990) (same).

Furthermore, Petitioners never identified any witness who they would have called or any evidence that they would have presented had they been allowed more time. *See McKnight*, 908 F.2d at 114-15 (to preserve complaint about time limits, party must show what it would do with additional time); *Johnson v. Ashby*, 808 F.2d 676, 677 (8th Cir. 1987) (complaint about time limits waived by failure to make offer of proof). *See generally* FED. R. EVID. 103(a)(2) (offer of proof is necessary to preserve complaint about exclusion of evidence).

In this Court, Petitioners suggest that they were excused from identifying the witnesses or the evidence that they would have introduced because Dale Sterritt filed a pretrial exhibit list and a pretrial witness list.[5] *See* Petition at 21. However, neither of the lists identified the substance of the testimony that Sterritt hoped to elicit. As the District Court observed, Sterritt had not even participated in the preparation and filing of the joint pretrial order. *See* 4SR1:4-5, 39. The Court was not required to allow Sterritt additional time (when he had not exhausted his allotted time anyway) for "presenting witnesses if [it] [didn't] even know what defenses those witnesses [were] supposed to support." *Id.*

Finally, Petitioners' emphasis on the volume of Respondents' exhibits is disingenuous. *See* Petition at i ("over 1000 Plaintiffs' exhibits"), ii ("over 1000 trial exhibits"), 10 ("Respondents' 1039 trial exhibits"), 18 ("1039 trial exhibits").[6] Petitioners make a great show of detailing the number of exhibits that Respondents introduced to prove the land flips and other related-party transactions. *See* Petition at 20 & nn.11-15. They urge repeatedly that they needed more time to challenge these "very voluminous" documents. *See id.* at 19.

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[5] Petitioners suggest, but do not explain, how an exhibit list or a witness list filed by Dale Sterritt preserved error for the RDSSR group. The RDSSR group also filed an exhibit list and a witness list. All the exhibits on its list were introduced into evidence, and the majority of the witnesses were called. The RDSSR group failed to issue any trial subpoena for the witnesses who were not called.

[6] Because it fails to account for gaps in the exhibit numbering, Petitioners' figure is exaggerated. Even counting multiple-part exhibits as separate exhibits, Respondents actually had 725 trial exhibits.

Yet, at trial, Petitioners never once attempted to refute the related-party character of the transactions. Indeed, during his closing argument, Dale Sterritt's lawyer *conceded* that the transactions were among related parties, and tried to convince the jury that Rahr still would have invested had he known that fact. 2SR12:1533. The lawyer for the other Petitioners, in his longer closing argument, did not even mention, never mind challenge, the related-party nature of the transactions.

In view of Petitioners' failure to suggest either to the District Court, or to the Fifth Circuit, or to this Court what evidence they would have introduced, if granted more time, to refute the overwhelming evidence that the challenged transactions were among related parties, and in view of their ultimate concession on that point, Petitioners' due process rights would not have been implicated even if Respondents had introduced 100,000 trial exhibits to prove the related-party nature of the transactions.

C. Petitioners Did Not Exhaust the Time Allowed for Closing Argument.

Petitioners also complain that they were given insufficient time to present closing argument. *See* Petition at 15-18. Petitioners fail to mention, though, that they failed to object or to request additional time at the conclusion of their respective arguments. *See United States v. Leal*, 30 F.3d 577, 586 (5th Cir. 1994) (to preserve objection to time limits, party must request additional time at the conclusion of argument); *United States v. Bernes*, 602 F.2d 716, 722 (5th Cir. 1979) (same).

Petitioners also fail to mention that Dale Sterritt did not use the full time allocated for his argument.

2SR12:1535. *See Bernes*, 602 F.2d at 722 n.9 (appellant must show actual prejudice from time allocation). Further, they obscure the fact that that the RDSSR group went almost twice as long as originally allocated. 2SR12:1572; *see also* Petition at 16 n.7.

D. Petitioners Obtained All the Discovery That They Sought.

Although not mentioned in their Questions Presented for Review, Petitioners complain that the District Court did not allow them sufficient time in which to conduct pretrial discovery. *See* Petition at 6-7. Petitioners claim that they were afforded only 45 days in which to conduct discovery. *See id.*

This claim simply is not true. Admittedly, Petitioners had 45 days after the District Court entered its Scheduling Order in which to *complete* discovery. *See id.* But, that does not mean that Petitioners had only 45 days in which to *conduct* discovery. Petitioners were not required to wait until the Court entered a Scheduling Order before they began discovery.

This case had been on file for more than 16 months before the District Court even entered the Scheduling Order. 4SR1:3; ARE1. It had been pending in the United States District Court for the Northern District of Texas for almost one year. R1:42. And, because the orders denying Petitioners' motions to dismiss came almost one month before the Scheduling Order, Petitioners were also free to use that time to conduct any discovery that they desired.

Moreover, Respondents agreed to extend the discovery deadline for two weeks, and provided dates for a number

of depositions that Petitioners demanded. R17:3647-714. Petitioners, however, never issued notices for many of those depositions, and they failed to appear for several of the depositions that were noticed. *See id.* Petitioners gave every indication in the District Court that they had conducted all the discovery that they desired. Certainly, they have never identified any specific discovery that they were unable to complete before the discovery deadline. *Cf. Martel v. County of Los Angeles*, 56 F.3d 993, 995 (9th Cir. 1995) (decision to deny continuance to obtain discovery will be disturbed only " 'upon the clearest showing [of] . . . actual and substantial prejudice' ") (quoting *Sablan v. Department of Fin.*, 856 F.2d 1317, 1321 (9th Cir. 1988)).

E. Sanctions That Were Never Imposed Did Not Violate Dale Sterritt's Rights.

Petitioners also complain (again, without any mention in their Questions Presented for Review) that the District Court improperly "sanctioned" Dale Sterritt for failing to participate in the joint pretrial order. *See* Petition at 8-9. In doing so, however, Petitioners fail to mention that the Scheduling Order specifically informed each party that sanctions would be imposed if such party failed to participate in the joint pretrial order. *See* R12:2807.

Additionally, on the first morning of trial, the District Court reversed itself, and announced that Dale Sterritt could participate in trial. *See* 2SR4:7. While Dale Sterritt now complains that this does not matter because, once the District Court announced the "sanction," he did not prepare, *see* Petition at 10, he made no such complaint in the District Court. In the District Court, Dale Sterritt never complained that he had been unable to prepare for trial

because the Court had announced at the pretrial conference that Sterritt would not be allowed to participate. *See Abbott v. Equity Group, Inc.*, 2 F.3d 613, 627 n.50 (5th Cir. 1994) (issue not raised before district court is waived).

Although Petitioners wish to pretend otherwise, this case presents no genuine due process concerns. A full and fair reading of the record reveals legitimate reasons for each of the District Court's actions. Further, to the extent this case ever could have been said to present due process concerns, those concerns are submerged in a sea of waiver. The Fifth Circuit's emphasis on waiver was no accident. *See* Petitioners' App. at 4a ("we find no error on the part of the District Court with respect to those issues not waived on appeal.").

II. This Case Does Not Present Any Novel or Important Question of Federal Securities Law.

In their second attempt to grab this Court's attention, Petitioners fashion "an important question of federal law that has not been directly settled . . . by this Court." *See* Petition at 29. Petitioners claim that this case raises the question of whether the doctrine of *in pari delicto* extends to bar a plaintiff from recovering under federal securities law for inside information that is repeated in public filings that contain cautionary statements. *See id.*

A. The Final Judgment Can Be Affirmed Without Relying on Federal Securities Law.

In seeking to entice the Court with a novel question of federal securities law, Petitioners seek to create the impression that this case was largely, if not wholly, based upon federal securities law. Petitioners fail to mention

that the Final Judgment entered in favor of CIC is not even based upon federal securities law. *See* RE7. The Final Judgment in favor of CIC is based solely upon Texas state law – specifically, the jury's findings that Petitioners breached and/or conspired to breach their state-law fiduciary duties to CIC. *See* RE5:4183-92.

Further, Petitioners neglect to mention that the Final Judgment entered in favor of Rahr is not based solely upon federal securities law. RE7. The jury did find that Petitioners committed securities fraud against Rahr, RE5:4151-61, but the jury also found that Petitioners committed Texas statutory fraud, conspired to commit Texas statutory fraud, and made one or more negligent misrepresentations to Rahr under Texas state law, RE5:4162-76. The Final Judgment is based upon those state-law findings as well as the federal securities law findings.

Ultimately, then, whether a claim under federal securities law is barred under the circumstances posed by Petitioners is immaterial to this case. Whether or not Rahr is entitled to recover under federal securities law, CIC and Rahr are entitled to recover under Texas state law. Whether or not this Court "render[s] judgment that Respondents take nothing for their claims under the Federal Securities laws," *see* Petition at 30, the Final Judgment must be affirmed.

B. Petitioners Cannot Rely upon the Doctrine of *In Pari Delicto*.

Petitioners also neglect to mention that they failed to preserve their arguments based on the doctrine of *in pari delicto*. In the District Court, Petitioners failed to propose

any questions related to their affirmative defense that could have been included in the jury charge. ARE5.

Further, this Court already has held that the doctrine of *in pari delicto* is unavailable to Petitioners – the very insiders who provided information to Rahr. *See Pinter v. Dahl*, 486 U.S. 622, 633 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 314 (1985).

C. The Record Does Not Even Support Petitioners' Alleged Defense.

Finally, the premise upon which Petitioners' argument is based is flawed. The jury's findings of securities fraud were not necessarily based upon the two "key" misrepresentations identified by Petitioners – *i.e.*, the misrepresentations (1) that CIC's stock would be listed on the NASDAQ exchange, and (2) that the Hole would be permitted as a landfill. *See* Petition at 25-29.

There were dozens of material misrepresentations, large and small, upon which the jury could have based its findings of fraud. *See* PX40. For example, the jury could have based its findings of fraud on Dale Sterritt's repeated misrepresentations that CIC was using Rahr's money for the legitimate business purpose of developing the Hole and securing a NASDAQ listing. 2SR8:689-96, 725-30; PX16:7, 17:3, 46. Or, the jury could have based its findings of fraud on the numerous false representations that CIC's assets were as represented on the balance sheet. 2SR6:410-23; 2SR7:7-11, 16-24; PX103, 109, 111, 144, 151-54, 156, 158, 258, 809:F-9, 816. Evidence of any one of the misrepresentations, none of which was subject to any cautionary statements, supported the jury's findings.

Hence, it does not matter whether the doctrine of *in pari delicto* bars a plaintiff from recovering under federal securities law for inside information that is repeated in public filings that contain cautionary statements. The Final Judgment can (and must) be affirmed based upon the numerous misrepresentations made by Dale Sterritt, which were not subject to any cautionary statements. Indeed, the Final Judgment can (and must) be affirmed based upon Petitioners' numerous violations of Texas state law.

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari presents no genuine issues worthy of United States Supreme Court review, and urge the Court to deny certiorari.

Respectfully submitted,

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